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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115

COMMENTS OF MCCAW CELLULAR COMMUNICATIONS, INC.

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McCaw Cellular Communications, Inc. ("McCaw") hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1] The Notice proposes a comprehensive rewrite of the Part 22 rules governing common carrier mobile radio services. The Commission has stated that its purpose in proposing these rule changes is "to make [the] rules easier to understand, to eliminate outdated rules and unnecessary information collection requirements, to streamline licensing procedures and to allow licensees greater flexibility in providing service to the public."[2]

I. INTRODUCTION

McCaw, both directly and through its 52 percent ownership of LIN Broadcasting Corporation, is the largest

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[1] 7 FCC Rcd 3658 (1992) ("Notice").

[2] Id. at ¶ 1.

cellular telephone company in the United States. It operates cellular systems in markets around the country, ranging in size from the New York, New York MSA to rural service areas. The company is also the fifth largest radio common carrier in the United States and provides paging and conventional two-way mobile services in a number of western and midwestern states. McCaw, accordingly, has a vital interest in ensuring that the Commission's goal of streamlining and improving Part 22 is realized in this proceeding.[3]

McCaw commends the Commission on its work in preparing this Notice. McCaw believes that many of the proposals set forth in the Notice will achieve the purposes articulated by the Commission. At the same time, McCaw believes that some of the proposed rules are inconsistent or confusing. Also, in some cases, the company believes that current rules or alternative procedures would better serve the public interest than the suggested changes. McCaw looks forward to working with the Commission and other members of the industry to develop final rules that fulfill the Commission's mandate for this proceeding.

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[3] McCaw has also participated as a member of Telocator and the Cellular Telecommunications Industry Association in evaluating the proposals contained in the Notice.

II. SUMMARY

The Commission's Notice is the culmination of several years of effort by Commission staff and industry representatives to improve Part 22. In large part, the Notice is a testament to the success of that cooperative effort. McCaw endorses many of the draft revised rules, and believes their adoption will further the public interest. As discussed below, however, McCaw has concluded that some of the proposed rule sections should be modified, deleted, or supplemented in order to achieve the Commission's stated goals. Accordingly, in conjunction with several general recommendations, McCaw suggests the following specific changes:

Rules Common to All Public Mobile Services. The rules applicable to all Public Mobile Services need to be clarified in several important respects:

- Section 22.99: The term "assignment of authorization" should not also include "transfer of control," since that is a different type of transaction and is separately defined in the proposed rules. The definition of "fill-in transmitter" should be expanded to include the full range of operations that fall within that concept in the cellular area, or the definition should be deleted unless specifically referenced in the remainder of the proposed rules. Finally, the Commission should adopt a specific definition for "service to the public" in the paging and radiotelephone services. These changes will facilitate understanding of the Part 22 requirements.

- Section 22.121: The limitation on the filing of certain types of applications within one year of

the termination of a construction permit for failure to commence providing service to the public should be recrafted. This prohibition should not extend to construction permits voluntarily turned in to the Commission by the permittee in advance of the expiration of the construction period. Also, because the proposed rule is incompatible with the FCC's regulatory structure for cellular service, a specific exemption for cellular should be added to the rule.

- Section 22.142: The rule concerning the filing of notifications on Form 489 with respect to the commencement of service should be clarified. At present, the rule could be interpreted to require that notifications be submitted to the Commission whenever a new cellular transmitter is put into operation, a result inconsistent with other stated policies.

- Section 22.159: The Commission should make clear that carriers may supply more specific values for average terrain elevation in Dade and Broward Counties, rather than relying exclusively on the default value of 3 meters.

- Section 22.167: The finder's preference rules should be clarified in two respects. First, the Commission should adopt procedures requiring service of such a filing on the affected entity and providing an opportunity to file a response. Second, the rule should specifically state that it is not applicable to the cellular service.

- Section 22.143: The Commission's rules for the construction of facilities prior to grant should be further amended to permit construction within 45 days after the application is placed on public notice, subject to compliance with Federal Aviation Administration requirements and environmental impact standards. This modification will increase the efficiency of carrier operations without adversely affecting the public interest.

- Section 22.105: The Commission should make clear that microfiche copies of oppositions and replies with respect to Part 22 applications may still be filed within 15 days of the submission of the paper copies. The revised rule contained in the Notice could be interpreted to preclude this option.

- Section 22.325: The Commission's rules concerning the operation of control points should make clear that a centralized control point where an individual is readily available to turn off facilities as necessary is sufficient to comply with the rule obligations.

- Section 22.367: Cellular stations should be permitted to employ either vertically or horizontally polarized waves.

Paging and Radiotelephone Service. McCaw urges the Commission to alter its proposed rules governing the processing of paging and radiotelephone applications and the use of multifrequency transmitters.

- Section 22.509: The current proposal for the processing of paging and radiotelephone service applications on a first-come/first-served basis will unnecessarily limit the ability of current licensees to expand their systems consistent with consumer demand. The Commission instead should permit existing licensees to file a mutually exclusive application within 30 days of an application being placed on public notice. This will balance the Commission's desire to expedite the processing of paging and radiotelephone service applications with the legitimate need of existing licensees to be able to respond to customer demand.

- Section 22.507: The Commission also should not bar the use of multifrequency transmitters, as is currently proposed in the Notice. Such transmitters serve a valuable role, and permit carriers to continue to provide economical service to subscribers in many circumstances. Accordingly, their use should continue to be permitted.

Cellular Radiotelephone Service. The proposed rules set forth in the Notice do not yet reflect all the rule provisions adopted in the unserved areas and cellular renewal proceedings. Also, the rules related to cellular service

contain some inconsistencies. McCaw urges the Commission to consider the following changes:

- Sections 22.123, 22.163, 22.165: The rules governing major and minor filings, minor modifications, and additional transmitters in the cellular service need to be revised to reflect the Commission's decision to permit cellular carriers to make a range of system modifications without filing any notifications with the Commission. In addition, the Commission should require carriers to file Forms 489 associated with the cells constituting the outside contours of a system's CGSA so that other carriers will be able to assess interference possibilities in designing their own systems. Finally, any internal cells should receive full interference protection.

- Section 22.901: The rules should contain a definition of dispatch service as applied in the cellular context. This is necessary to ensure that licensees understand the limits of this excluded service offering.

- Sections 22.357, 22.369, 22.915 and 22.915: Rules concerning emissions and related technical matters should specifically account for the implementation of digital technology in cellular systems.

- Section 22.913: The Commission should retain the opportunity for carriers to reach agreement with adjacent and other affected cellular licensees to operate in excess of the height/power limitations.

- Section 22.941: McCaw supports the Commission's proposal to permit cellular carriers to make SID code changes with a Form 489 notification filing.

- Section 22.927: Language referring to the provision of service pursuant to tariffs should be omitted from the sections governing the responsibility of cellular licensees for mobile stations used with their systems.

Proposed Forms. The application forms should be revised to required applicants to specify site coordinates under the North American Datum of 1927 and the North American Datum of

1983 in order to minimize the likelihood that applicants will submit incorrect coordinates during the period before the Commission converts to the North American Datum of 1983. Table MOB-3 of FCC Form 401 should be retained in full so that adjacent licensees can replicate the calculations to monitor for interference. The Form 401 or its directions should specifically state when applicants must provide a vertical antenna profile sketch, so that the application when originally submitted is as complete as possible.

III. RULES COMMON TO ALL PUBLIC MOBILE SERVICES

A. Use of Metric Measurements

Pursuant to the Metric Conversion Act of 1975, the Notice proposes to convert heights and distances contained in the Part 22 rules from English units to metric.[4] The Commission has sought to round the converted quantities to convenient whole numbers where possible.[5] As a practical matter, the proposed rules contain references to measurements in both English and metric units.

McCaw urges the Commission to employ one measurement or the other, but not both. Conversion back and forth between the two types of units, accompanied by rounding, may lead to

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[4] Notice at ¶ 6.

[5] Id.

gross errors in information provided to the Commission. Moreover, use of both measurements may be subject to manipulation. If the Commission wants to implement the metric system, then all heights and distances should be specified in only that unit.

B. Definitions

1. Assignment of Authorization

The Notice includes the following definition for "Assignment of authorization":

> A transfer of a Public Mobile Services authorization from one party to another, voluntarily or involuntarily, directly or indirectly, or by transfer of control of the licensee.[6]

"Transfer of control" is separately defined as "[a] transfer of the controlling interest in a Public Mobile Services licensee from one party to another."[7] Although an assignment and a transfer of control are two different types of transactions, the proposed definition of "assignment of authorization" incorporates both categories.

Combining both types of transactions under the proposed "assignment" definition is likely to lead to confusion among applicants. The rules will be clearest if they refer separately to "assignment" and to "transfer of control."

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[6] Proposed § 22.99.

[7] Id.

McCaw urges the Commission to limit the definition of "assignment of authorization" to "[a] transfer of a Public Mobile Services authorization from one party to another, voluntarily or involuntarily, directly or indirectly," and retain the separate definition of "transfer of control." This action will require conforming changes in additional rule sections in order to state specifically that they involve both assignments and transfers of control.[8]

2. Fill-in Transmitters

The definition of fill-in transmitters also raises some questions. That term currently is defined as follows:

> In the Cellular Radiotelephone Service, transmitters added to the first cellular system authorized on a channel block in a cellular market during the five-year fill-in period in order to expand the coverage of the system within the market. In the Paging and Radiotelephone Service, transmitters added to a station, in the same area and transmitting on the same channel as previously authorized transmitters, for the purpose of improving reception in dead spots.[9]

McCaw's concerns involve the cellular portion of the definition, which is limited solely to transmitters installed during the five-year protected fill-in period by the first licensee on a particular cellular block. The definition

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[8] Conforming changes to proposed Sections 22.108, 22.137 and 22.139, to reference transfer of control as well as assignment, will be required.

[9] Proposed § 22.99.

omits transmitters installed after the five-year date has expired and that do not alter the licensee's CGSA. Such transmitters currently may be installed pursuant to a Form 489 notification, and are also typically referred to as fill-in transmitters. Also, the proposed definition appears to exclude what otherwise would be fill-in transmitters if installed by the second licensee in a partitioned market or by an eventual unserved areas licensee.

As far as McCaw has been able to determine, while "fill-in transmitters" is a defined term, it is not used elsewhere in the proposed rules. Accordingly, this definition should be eliminated. Alternatively, if the defined term is deemed necessary, McCaw suggests that the Commission rework the definition of "fill-in transmitters" to include the circumstances discussed above.

3. Service to the Public

McCaw recommends that the Commission include in Section 22.99 a definition of "provision of service to the public." This is important since a number of the rules proposed in the Notice are dependent on a licensee providing "service to the public." For example, proposed Section 22.142 requires that "[s]tations must begin providing service to the public no later than the date of required commencement of service specified on the authorization. If service to the public has not begun by the date of required commencement of service,

the authorization terminates . . . without action by the Commission."[10] An FCC Form 489 must be submitted to the Commission within 15 days after service to the public has commenced.[11] Authorizations automatically terminate without further Commission action if construction has not been completed and service rendered to the public by the construction completion date.[12] An entity with an authorization that has automatically expired without providing service to the public may not resubmit an application for such facilities for a period of one year.[13] An application for a finder's preference may be filed by an entity if the time for construction of the facility has expired and the licensee has not yet commenced service to the public.[14] The proposed rule designed to prohibit the use of multifrequency transmitters requires a separate dedicated transmitter providing service to the public for each transmitting channel at each location.[15] And, the "Additional Channels Rules" are based on a carrier applying for a channel or channels, receiving an authorization for the

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[10] Proposed § 22.142 (emphasis added).

[11] Proposed § 22.142(b).

[12] Proposed § 22.144(b).

[13] Proposed § 22.121(d).

[14] Proposed § 22.167.

[15] Proposed § 22.507(a).

channel or channels, providing service to the public and notifying the Commission of the commencement of service to the public before additional channels may be sought.[16]

In view of the extensive use and importance of the term service to the public or provision of service to the public, McCaw urges the Commission to adopt a specific definition of "service to the public" in the context of paging and conventional two-way mobile applications. In this regard, McCaw notes that the proposed rules for cellular service define the term "provision of cellular service to the public" as a system that:

> [is] interconnected with the public switched telephone network (PSTN) and must be providing service to mobile stations operated by its subscribers and roamers. A cellular system is not considered to be providing service to the public if mobile stations can not make telephone calls to landline telephones and receive telephone calls from landline telephones through the PSTN, or if the system intentionally serves only roamer stations.[17]

Recognizing that there are both differences and similarities between paging/conventional two-way systems and cellular systems, McCaw proposes that "service to the public" for

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[16] Proposed §§ 22.539, 22.569.

[17] Proposed § 22.946(a)(1).

paging and radiotelephone systems be defined as a paging or conventional two-way system that:

> [is] interconnected with the public switched telephone network (PSTN) and must be capable of providing paging and/or radiotelephone service.

Adoption of this definition will provide certainty and clarification to all parties and should help to reduce confusion with regard to this concept.

C. Application Requirements and Procedures

1. One-Year Reapplication Prohibition

Proposed Section 22.121(d) specifies:

> If an authorization is automatically terminated because of failure to commence service to the public (see § 22.144), the Commission will not consider an application for another authorization to operate a station on the same channel . . . in the same geographical area by that party, or by its successor or assignee, or on behalf of or for the benefit of the parties in interest to the terminated authorization, until one year after the date the authorization terminated.

Proposed Sections 22.144(a) and (b) provide that authorizations will automatically expire without Commission action if a timely renewal application is not filed and ". . . on the date of required commencement of service, if service to the public is not commenced by that date."[18] The

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[18] Apart from the need to define the concept of "service to the public" as raised above, McCaw believes that proposed Section 22.144 is reasonable and should be adopted.

Notice states that "[t]his proposal will encourage licensees to construct facilities for which they have received an authorization and will thus discourage warehousing."[19]

Initially, McCaw believes that proposed Section 22.121(d) should be clarified to state expressly that its provisions are not applicable when an authorization is voluntarily returned to the FCC in advance of the construction deadline. Moreover, as proposed, the rule appears to be inconsistent with the Commission's cellular policies.

The Commission's current rules grant cellular carriers considerable flexibility in locating transmitters within their markets to accommodate demand and technical constraints.[20] A cellular carrier may allow a cell site construction permit to lapse and the licensee may file another modification application in the same geographic area within one year for legitimate reasons related to effective system design and operation. For example, the original site may become unavailable due to zoning or tower leasing

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[19] Notice, App. A at 7.

[20] E.g., 47 C.F.R. §§ 22.913, 22.923, set forth at 57 Fed. Reg. 13646, 13649 (Apr. 17, 1992); Unserved Areas in the Cellular Service, 7 FCC Rcd 2449, 2457 (1992) (Second Report and Order), pets. for recon. pending. Indeed, the cellular policies have always afforded carriers substantial discretion concerning transmitter location and coverage. E.g., Cellular Communications Systems, 86 F.C.C.2d 469, 507, 509-10 (1981), recon., 89 F.C.C.2d (1982), further recon., 90 F.C.C.2d 571 (1982).

constraints. The licensee also may determine that a cell site located at the originally authorized site may not attain the required level of technical performance as that associated with an alternative site due to factors such as surrounding terrain and structures. In addition, licensees in adjacent markets may propose or construct border cells that affect the licensee's own plans.

It is unclear how the Commission's proposed Section 22.121(d) would work in these circumstances and the Commission should clarify that the rule does not apply to the cellular service. The intent of the rule is to prevent carriers from warehousing frequencies, a problem that is already addressed in the cellular service by the Commission's geographic licensing scheme that is tied to specific, exclusive fill-in periods.[21]

Thus, the proposed rule is unnecessary for the cellular service and, in fact, could be detrimental to the public interest. It could, for example, be applied to block a cellular carrier from providing service to a specific part of its market because of a previously lapsed construction permit

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[21] During the fill-in period, cellular carriers have the right to propose service anywhere within their licensed markets, regardless of whether previously proposed sites were relocated or never built. After the fill-in period, carriers can only propose transmitters within their previously authorized Cellular Geographic Service Area ("CGSA"). Consequently, cellular carriers have no incentive to propose transmitters they don't intend to build to warehouse frequencies because the fill-in periods cut off their ability to file multiple applications for the same geographic area.

even though it is the only entity entitled to build a transmitter at that location. This could deprive cellular carriers of the flexibility they currently enjoy in designing their systems and lead to delays in the provision of cellular services to the public, a result inconsistent with the public interest.

2. Commencement of Service and Notification Requirement

Proposed Section 22.142(b) states: "Licensees must notify the Commission (FCC Form 489) of commencement of service to the public. The notification must be mailed no later than 15 days after service begins." McCaw strongly supports the change to allow carriers to file Form 489 notifications up to fifteen days after the commencement of service. The Commission has successfully applied a similar rule to its Part 21 services without adverse consequences, and the adoption of this rule revision may well eliminate a number of technical rule violations.

The proposed rule, however, needs to be clarified. As currently stated, the notification requirement could be interpreted to require the filing of a Form 489 every time a new cellular transmitter is brought into service. This is inconsistent with the Commission's proposal to eliminate the notification requirement for transmitters added to the core

of a cellular system.[22] To be consistent and clear, the Commission should restate this rule section to indicate its scope in the cellular context -- a Form 489 notification covering the initial authorization, or Form 489 notifications covering modification construction permits, or Form 489 notifications of the addition of fringe cell sites.

3. Computation of Average Terrain Elevation

Proposed Section 22.159(c) provides that the average terrain elevation is assumed to be 3 meters (or 10 feet) in Dade and Broward Counties in Florida. This rule should be deleted or revised to allow carriers to use more accurate data, if available. For example, McCaw's cellular engineers use software based on three second maps that provide specific information on average terrain elevation in these counties. Licensees should be allowed to use such data in place of a default value if they have it.

4. Finder's Applications

McCaw generally supports the finder's preference rules as proposed by Section 22.167 for application to the paging and radiotelephone service. It believes these rules will help to ensure that paging and conventional two-way mobile channels are being utilized rather than warehoused. However,

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[22] See Notice, App. A at 10; proposed § 22.165.

McCaw has concerns that some parties might employ the finder's preference rules to create an additional burden on existing licensees as well as Commission resources. This would thwart one of the primary goals of the Notice -- making application processing more expedient.

To prevent the finder's preference rules from creating more work for the Commission rather than less, McCaw believes two actions are necessary. First, as discussed above, the Commission must specifically define what constitutes "provision of service to the public." Second, McCaw believes a party that files an application under proposed Section 22.167 should be required to serve a copy of the application on the entity against whom the preference is sought. Further, proposed Section 22.167 should specifically afford the party against whom the application is filed an opportunity to respond within 30 days of the date the finder's application is placed on Public Notice. Implementation of these procedures will serve to focus more narrowly the facts in dispute, and may well conserve Commission resources that might otherwise be allocated to conduct the appropriate technical and legal investigation.

McCaw also is very concerned that this rule provision could be very disruptive or a tool for harassment in the cellular service. In any portion of a cellular system, a carrier may not use all available spectrum -- this is a natural byproduct of the cellular reuse scheme. Nonetheless,

some entities, for the sole purpose of harassment, might try to claim that a finder's preference application should be accepted for filing. Even if that application is never granted, a cellular carrier may be forced to expend resources to defend against the claim. Moreover, as a practical matter, it seems unlikely that a finder's preference application would ever be appropriate in the cellular service.[23] The Commission should thus make explicit that proposed Section 22.167 does not apply to the cellular frequencies.

5. Construction Prior to Grant of Application

Proposed Section 22.143 contains the rules concerning the construction of facilities prior to the receipt of a Commission authorization. In light of proposals contained in the Notice and these comments, McCaw believes that the rule should be revised to allow construction 45 days (instead of 90) after the date the application is placed on public notice.

The current pre-authorization construction rule, 47 C.F.R. § 22.43(d) (1991), allows a licensee to construct proposed facilities beginning 90 days after the date of

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[23] To date, the Commission has released a public notice whenever any RSA system has not initiated service on a timely basis and the authorization has been terminated. Moreover, the unserved areas rules appear to provide the necessary mechanisms for the filing of applications in the cellular service.

public notice of the application, subject to compliance with certain other conditions. In adopting this rule, the Commission found that implementation of this procedure would serve the public interest.[24] Ninety days was specified in large part because the rules permitted paging and radiotelephone applicants to file mutually exclusive applications within 60 days of the public notice date.

If the Commission looks at the factors it considered when the pre-construction rule was first adopted, a 45 day waiting period appears to be appropriate under the proposed rules.[25] First, the Commission has proposed in the Notice to delete this 60 day filing period. As noted below, McCaw believes that the rules should afford existing licensees 30

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[24] Amendment of Part 22 of the Commission's Rules To Allow Public Mobile Service Applicants To Commence Construction After Filing FCC Form 401, But Prior To Receiving An Authorization, 4 FCC Rcd 5960 (1989).

[25] If the Commission adopts its first-come/first-served policy without the modification suggested by McCaw, the waiting period could be further shortened. Indeed, McCaw believes that Part 22 applicants should be permitted to begin construction as soon as the application is filed, provided the applicant has obtained all required approvals of the Federal Aviation Administration ("FAA") including necessary painting and lighting specifications, and the proposed construction would not have a significant environmental impact as set forth in Section 1.1301 et. seq. of the Commission's Rules. Furthermore, the applicant would be required to assume all risk (financial and otherwise) in the event it did not ultimately receive an authorization. The applicant would also be required to stop construction immediately upon notification by the Commission. Lastly, and most importantly, the applicant would not, under any circumstances, be allowed to commence operations and provide service to the public using such facilities until and unless the Commission granted authority to do so.

days from the date of public notice to file competing applications. This is the same period allowed for the filing of petitions to deny. Second, adding an additional 15 days for service and for identifying mutually exclusive applications leads to the calculation of a 45 day period, at which time pre-authorization construction should be permitted.

6. Microfiche Filing

Section 1.45(a) and (b) of the Commission's Rules currently permits parties to file the microfiche copies of oppositions and replies associated with Part 22 applications within 15 calendar days after the paper filing.[26] The language of proposed Section 22.105(e) should be clarified to ensure that this opportunity is not inadvertently removed. Specifically, proposed Section 22.105(e), which partially restates portions of current Section 22.6, directs that "the paper originals of applications, notifications, amendments, reports, correspondence, and pleadings must be submitted at the same time as the microfiche required by paragraph (d) of this section."[27] This language suggests that the microfiche must be submitted concurrently with the paper original of an opposition or reply, thus dispensing with the grace period

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[26] 47 C.F.R. § 1.45(a), (b) (1991).

[27] Proposed § 22.105(e) (emphasis added).

prescribed by Section 1.45. Even though this interpretational issue arguably exists under the rules now in place, this rewrite presents an opportunity to clarify the text of the rules to reflect the Commission's intent and current practice.

7. Content of Applications

a. Coordinates

As discussed in a Note to proposed Section 22.115(a)(4), the FAA will begin to use coordinates for antenna sites based on the 1983 North American Datum effective October 15, 1992. Until the Commission converts to that method, Part 22 licensees and applicants are required to provide coordinates in their FCC applications based on the 1927 North American Datum.[28] McCaw believes that the Commission should provide space on the proposed forms for applicants to supply the identifying coordinates as determined by both methods. This will help to minimize confusion, reduce the likelihood that coordinates will be erroneously identified, and limit errors in the conversion of coordinates from one datum to the other.

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[28] See FCC Public Notice, "The Federal Communications Commission Continues To Require Applicants To Use Coordinates Based on the North American Datum of 1927," DA 82-1188 (Sept. 1, 1992).